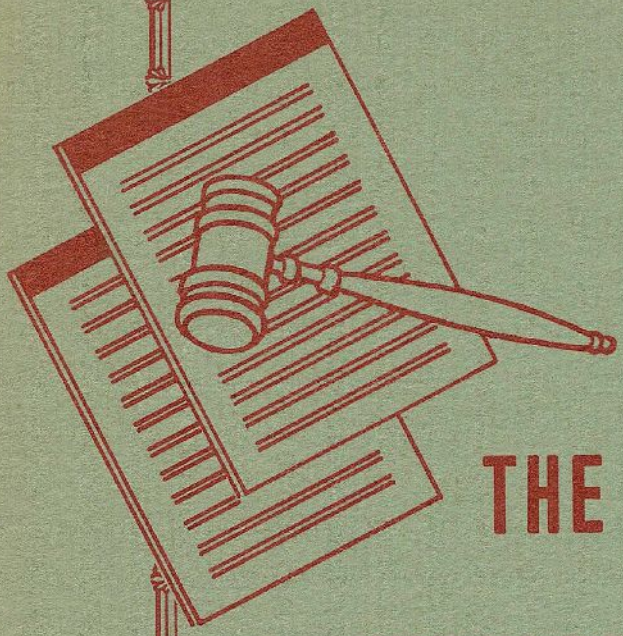

THE TENNESSEE REAPPORTIONMENT CASE

VIEWS OF THE MINORITY

Excerpts from the Dissenting Opinions of
Justices FRANKFURTER and HARLAN

DISTRIBUTED BY
THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT

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THE TENNESSEE REAPPORTIONMENT CASE

THE decision of the United States Supreme Court on March 26, 1962, in *Baker* v. *Carr,* the Tennessee redistricting case, continues the Court's alarming assault against the long reserved rights of the States. If the vast power here implicitly arrogated to Federal courts ever is exercised to the full, the internal politics of every State will be determined by Federal judges.

In this opinion, the Chief Justice, and Justices Black, Douglas, Brennan, Clark and Stewart joined in holding that the Federal courts, and ultimately the Supreme Court, have power to review the acts of State legislatures in apportioning legislative seats within the several States. Justice Whittaker took no part in the decision. Justices Frankfurter and Harlan, in two dissenting opinions, each concurring with the views of the other, protested the Court's assumption of a power which properly belongs to the States and cannot reasonably be exercised by the Court.

The case came up from Tennessee, where the plaintiffs, who are citizens of urban areas, asserted that their votes have been debased or "watered down" by malapportionment. It was alleged that a small number of voters in rural areas elect more State senators and representatives than are elected by a larger number of voters in urban areas. The failure of the legislature of Tennessee to remedy this situation, said the plaintiffs, amounts to a denial of the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the United States Constitution. The district court in which the case was brought rejected the claim on the ground that the matter rested with the Tennessee legislature; it was held, in line with long established precedent, that the Federal courts, lacking proper facilities by which to reach a decision in such a politically involved matter, could not consider the case.

The majority opinion of the Supreme Court which reversed that holding was by no means unanimous. The Chief Justice and two associate Justices believed that the case should be remanded to the Federal district court in Tennessee with instructions simply to give relief if the plaintiffs established their claim. Mr. Justice Douglas felt the decision should be broader, authorizing Federal judicial interference into almost any problem concerning voting, and authorizing "any relief" that "can be fashioned in the light of well-known principles of equity." This would necessitate the outright reversal of a long line of cases beginning with *Colegrove* v. *Green,* 328 U.S. 549, decided in 1946. Mr. Justice Clark agreed with the majority, but thought it wrong to return the case to the district court without instructing that court as to the various means available for coercing Tennessee into obeying the court's mandate or, in the alternative, suggesting means by which the district court might divide the State in whatever manner that court deemed proper. Mr. Justice Stewart, the last of the concurring Justices, agreed that the cause was one upon which relief could be granted, but attempted to limit the effect of the decision by implying that the Federal courts would not exercise plenary power in establishing apportionment systems that would uniformly be required among the separate States.

In their two masterful dissenting opinions, Justices Frankfurter and Harlan conclusively establish a great number of points which destroy absolutely the arguments of the majority. The foundation of their position comes directly from the pages of the Constitution itself: This problem affects Tennessee and Tennessee alone; therefore the solution of the problem must be left to the people of Tennessee and their elected representatives.

If today the Supreme Court Justices may divide the State of Tennessee according to their views, tomorrow they may divide the Nation. If today the Justices pronounce the States incompetent to deal with this problem, tomorrow they may

pronounce the States incompetent to deal with State taxes, schools, highways, and courts of law.

The philosophy of the majority is found in one sentence of the Court's opinion: "We have [before us] no question decided, or to be decided, by a political branch of government coequal with this Court." That is to say, the States are inferior, and the Court is superior. The Court would do well to remember that until the States ratified the Constitution, there was no Supreme Court. The States created the Constitution, and the Constitution created the Court. Thus the States are the parents, the Court the child.

The Virginia Commission on Constitutional Government warmly endorses the dissenting opinions of Mr. Justice Frankfurter and Mr. Justice Harlan. (Senator John A. K. Donovan of Fairfax County, a member of the Commission, dissents; his statement appears on page 20). The following excerpts from the Frankfurter and Harlan opinions provide invaluable aid in understanding the consequences of the decision, and the compelling need for a bar against similar decisions in the future.

Excerpts From The Dissenting Opinions of Justices Frankfurter and Harlan

No. 6. — October Term, 1961

Charles W. Baker, et al.
Appellants,
v.
Joe C. Carr, et al.

On Appeal From the United States District Court for the Middle District of Tennessee.

[March 26, 1962.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex.

Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from

political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—State and Federal—guide-lines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is devoid of reality as "a brooding omnipresence in the sky" for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.

Recent legislation, creating a district appropriately described as "an atrocity of ingenuity," is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional require-

ment enforceable by courts.* Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the Federal courts of State reapportionments. To some extent—aye, there's the rub. In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If State courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the Federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only an euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially

*It is worth reminding that the problem of legislative apportionment is not one dividing North and South. Indeed, in the present House of Representatives, for example, Michigan's congressional districts are far less representative of the numbers of inhabitants, according to the 1960 census, than are Louisiana's. Michigan's Sixteenth District, which is 93.1% urban, contains 802,994 persons and its Twelfth, which is 47.6% urban, contains 177,431—one-fifth as many persons. Louisiana's most populous district, the Sixth, is 53.6% urban and contains 536,029 persons, and its least populous, the Eighth, 36.7% urban, contains 263,850—nearly half. Gross disregard of any assumption that our political system implies even approximation to the notion that individual votes in the various districts within a State should have equal weight is as true, *e. g.*, of California, Illinois, and Ohio as it is of Georgia. See United States Department of Commerce, Census Release, February 24, 1962, CB62-23.

more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

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In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years is overruled or disregarded. Explicitly it begins with *Colegrove* v. *Green*, 328 U.S. 549, decided in 1946, but its roots run deep in the Court's historic adjudicatory process.

Colegrove held that a Federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection Clause and other Federal constitutional and statutory provisions, of a State statute establishing the respective districts for the State's election of Representatives to the Congress. Two opinions were written by the four Justices who composed the majority of the seven sitting members of the Court. Both opinions joining in the result in *Colegrove* v. *Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power. While the two opinions show a divergence of view regarding some of these considerations, there are important points of concurrence. Both opinions demonstrate a predominant concern, first, with avoiding Federal judicial involvement in matters traditionally left to legislative policy-making; second, with respect to the difficulty—in view of the nature of the problems of apportionment and its history in this country—of drawing on or devising judicial standards for judgment, as opposed to legislative determinations, of the part which mere numerical equality among voters should play as a criterion for the allocation of political power; and, third, with problems of finding appropriate modes of relief—particularly, the problem of resolving the essentially political issue of the relative merits of at-large elections and elections held in districts of unequal population.

The broad applicability of these considerations—summarized in the loose shorthand phrase, "political questions"—in cases in-

volving a State's apportionment of voting power among its numerous localities has led the Court, since 1946, to recognize their controlling effect in a variety of situations. (In all these cases decision was by a full Court.) The "political question" principle as applied in *Colegrove* has found wide application commensurate with its function as "one of the rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 570. In *Colegrove* v. *Barrett*, 330 U.S. 804, litigants brought suit in a Federal district court challenging as offensive to the Equal Protection Clause Illinois' State legislative apportionment laws. They pointed to State constitutional provisions requiring decennial reapportionment and allocation of seats in proportion to population, alleged a failure to reapportion for more than forty-five years—during which time extensive population shifts had rendered the legislative districts grossly unequal—and sought declaratory and injunctive relief with respect to all elections to be held thereafter. After the complaint was dismissed by the District Court, this Court dismissed an appeal for want of a substantial Federal question. A similar District Court decision was affirmed here in *Radford* v. *Gary*, 352 U.S. 991. And cf. *Remmey* v. *Smith*, 342 U.S. 916. In *Tedesco* v. *Board of Supervisors*, 339 U. S. 940, the Court declined to hear, for want of a substantial Federal question, the claim that the division of a municipality into voting districts of unequal population for the selection for councilmen fell afoul of the Fourteenth Amendment, and in *Cox* v. *Peters*, 342 U.S. 936, rehearing denied, 343 U.S. 921, it found no substantial Federal question raised by a State court's dismissal of a claim for damages for "devaluation" of plaintiff's vote by application of Georgia's county-unit system in a primary election for the Democratic gubernatorial candidate. The same Georgia system was subsequently attacked in a complaint for declaratory judgment and an injunction; the Federal district judge declined to take the requisite steps for the convening of a statutory three-judge court; and this Court, in *Hartsfield* v. *Sloan*, 357 U.S. 916, denied a motion for leave to file a petition for a writ of mandamus to compel the district judge to act. In *MacDougall* v. *Green*, 335 U.S. 281, 283, the Court noted that "To assume that political

power is a function exclusively of numbers is to disregard the practicalities of government," and, citing the *Colegrove* cases, declined to find in "such broad constitutional concepts as due process and equal protection of the laws," *id.*, at 284, a warrant for Federal judicial invalidation of an Illinois statute requiring as a condition for the formation of a new political party the securing of at least two hundred signatures from each of fifty counties. And in *South* v. *Peters*, 339 U. S. 276, another suit attacking Georgia's county-unit law, it affirmed a District Court dismissal, saying

> "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength among its political subdivisions." *Id.*, at 277.

Of course it is important to recognize particular, relevant diversities among comprehensively similar situations. Appellants seek to distinguish several of this Court's prior decisions on one or another ground—*Colegrove* v. *Green* on the ground that congressional, not State legislative, apportionment was involved; *Remmey* v. *Smith* on the ground that State judicial remedies had not been tried; *Radford* v. *Gary* on the ground that Oklahoma has the initiative, whereas Tennessee does not. It would only darken counsel to discuss the relevance and significance of each of these assertedly distinguishing factors here and in the context of this entire line of cases. Suffice it that they do not serve to distinguish *Colegrove* v. *Barrett*, *supra*, which is on all fours with the present case, or to distinguish *Kidd* v. *McCanless*, 352 U.S. 920, in which the full Court without dissent, only five years ago, dismissed on authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan*, 343 U.S. 912, an appeal from the Supreme Court of Tennessee in which a precisely similar attack was made upon the very statute now challenged. If the weight and momentum of an unvarying course of carefully considered decisions are to be respected, appellants' claims are foreclosed not only by precedents governing the exact facts of the present case but are themselves supported by authority the more persuasive in that it gives effect to the *Colegrove* principle in distinctly varying circumstances in which State arrangements allocating relative degrees of political influ-

ence among geographic groups of voters were challenged under the Fourteenth Amendment.

The *Colegrove* doctrine, in the form in which repeated decisions have settled it, was not an innovation. It represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. . .

The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of State power challenged under broad Federal guarantees. . .

The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade. See *Texas* v. *White*, 7 Wall. 700; *White* v. *Hart*, 13 Wall. 646; *Phillips* v. *Payne*, 92 U.S. 130; *Marsh* v. *Burroughs*, 1 Woods 463, 471-472 (Bradley, Circuit Justice); cf. *Wilson* v. *Shaw*, 204 U.S. 24; but see *Coyle* v. *Smith*, 221 U.S. 559. . .

The influence of these converging considerations — the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of State government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted—has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," is not enforceable through the courts . . .

The starting point of the doctrine applied in these cases is, of course, *Luther* v. *Borden*, 7 How. 1. The case arose out of the Dorr Rebellion in Rhode Island in 1841-1842 . . .

Luther v. *Borden* was a trespass action brought by one of

Dorr's supporters in a United States Circuit Court to recover damages for the breaking and entering of his house. The defendants justified under military orders pursuant to martial law declared by the charter government, and plaintiff, by his reply, joined issue on the legality of the charter government subsequent to the adoption of the Dorr constitution. Evidence offered by the plaintiff tending to establish that the Dorr government was the rightful government of Rhode Island was rejected by the Circuit Court; the court charged the jury that the charter government was lawful; and on a verdict for defendants, plaintiff brought a writ of error to this Court.

The Court, through Mr. Chief Justice Taney, affirmed. . .

Mr. Justice Woodbury (who dissented with respect to the effect of martial law), agreed with the Court regarding the inappropriateness of judicial inquiry into the issues:

> "But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. . . .
>
> "Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. . . . [D]isputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, . . . if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own

invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times . . . ." *Id.*, at 51-53. . .

At first blush, this charge of discrimination based on legislative underrepresentation is given the appearance of a more private, less impersonal claim, than the assertion that the frame of government is askew. Appellants appear as representatives of a class that is prejudiced as a class, in contradistinction to the polity in its entirety. However, the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence. This, of course, is the practical effect of any allocation of power within the institutions of government. Hardly any distribution of political authority that could be assailed as rendering government nonrepublican would fail similarly to operate to the prejudice of some groups, and to the advantage of others, within the body politic. It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the State councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One canot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories

of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion* v. *Lightfoot*, 364 U.S. 339, *supra*. What Tennessee illustrates is an old and still widespread method of representation —representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. See *Luther* v. *Borden, supra*. Certainly, "equal protection" is no more secure a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican State. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words "the basic principle of representative government"—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today. Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty can not but give the appearance, if not reflect the reality, of involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, "itself a historical product," *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31, provides no guide for judicial oversight of the representation problem . . .

Dissenting opinion of MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins.

The dissenting opinion of MR. JUSTICE FRANKFURTER, in which I join, demonstrates the abrupt departure the majority makes from judicial history by putting the Federal courts into this area of State concerns—an area which, in this instance, the Tennessee State courts themselves have refused to enter. . . .

It is at once essential to recognize this case for what it is. The issue here relates not to a method of State electoral apportionment by which seats in the *Federal* House of Representatives are allocated, but solely to the right of a State to fix the basis of representation in its *own* legislature. Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this in-

stance runs afoul of any such limitation, we need not reach the issues of "justiciability" or "political question" or any of the other considerations which in such cases as *Colegrove* v. *Green*, 328 U.S. 549, led the Courts to decline to adjudicate a challenge to a State apportionment affecting seats in the Federal House of Representatives, in the absence of a controlling Act of Congress. See also *Wood* v. *Broom*, 287 U. S. 1.

The appellants' claim in this case ultimately rests entirely on the Equal Protection Clause of the Fourteenth Amendment. It is asserted that Tennessee has violated the Equal Protection Clause by maintaining in effect a system of apportionment that grossly favors in legislative representation the rural sections of the State as against its urban communities. . . .

I can find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that State legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history, as shown by my Brother FRANKURTER, but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of State legislatures and courts on matters of basically local concern.

In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government. It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that. To consider that we may ignore the Tennessee Legislature's judgment in this instance because that body was the product of an asymmetrical electoral apportionment would in effect be to assume the very conclusion here disputed. Hence we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise, between competing political philosophies. The Federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's

internal political conflict is desirable or undesirable, wise or unwise.

With respect to State tax statutes and regulatory measures, for example, it has been said that the "day is gone when this Court uses the Fourteenth Amendment to strike down State laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch. The Federal Constitution imposes no limitation on the form which a State government may take other than generally committing to the United States the duty to guarantee to every State "a Republican Form of Government." And, as my Brother FRANKFURTER so conclusively proves [*ante.* pp. 5-6], no intention to fix immutably the means of selecting representatives for State governments could have been in the minds of either the Founders or the draftsmen of the Fourteenth Amendment.

In short, there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. I would have thought this proposition settled by *MacDougall* v. *Green*, 335 U.S. 281, in which the Court observed (at p. 283) that to "assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and reaffirmed by *South* v. *Peters*, 339 U.S. 276. A State's choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income. Both are legislative judgments entitled to equal respect from this Court.

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A Federal District Court is asked to say that the passage of time has rendered the 1901 apportionment obsolete to the point where its continuance becomes vulnerable under the Fourteenth Amendment. But is not this matter one that involves a classic

legislative judgment? Surely it lies within the province of a State legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the State legislature.

Indeed, I would hardly think it unconstitutional if a State legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities. A State may, after all, take account of the interest of its rural population in the distribution of tax burdens, *e. g., American Sugar Rfg. Co.* v. *Louisiana,* 179. U. S. 89, and recognition of the special problems of agricultural interests has repeatedly been reflected in Federal legislation, *e. g.,* Capper-Volstead Act, 42 Stat. 388; Agricultural Adjustment Act of 1938, 52 Stat. 31. Even the exemption of agricultural activities from State criminal statutes of otherwise general application has not been deemed offensive to the Equal Protection Clause. *Tigner* v. *Texas,* 310 U.S. 141. Does the Fourteenth Amendment impose a stricter limitation upon a State's apportionment of political representatives to its central government? I think not. These are matters of local policy, on the wisdom of which the Federal judiciary is neither permitted nor qualified to sit in judgment. . .

From a reading of the majority and concurring opinions one will not find it difficult to catch the premises that underlie this decision. The fact that the appellants have been unable to obtain political redress of their asserted grievances appears to be regarded as a matter which should lead the Court to stretch to find some basis for judicial intervention. While the Equal Protection Clause is invoked, the opinion for the Court notably eschews explaining how, consonant with past decisions, the undisputed facts in this case can be considered to show a violation of that constitutional provision. The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other "malapportioning" States will quickly respond with appropriate political action, so that

this Court need not be greatly concerned about the Federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication. Whether dismissal of this case should have been for want of jurisdiction or, as is suggested in *Bell* v. *Hood*, 327 U. S. 678, 682-683, for failure of the complaint to state a claim upon which relief could be granted, the judgment of the District Court was correct.

In conclusion, it is appropriate to say that one need not agree, as a citizen, with what Tennessee has done or failed to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.

I would affirm.

The Virginia Commission On Constitutional Government

DISSENTING STATEMENT BY STATE SENATOR JOHN A. K. DONOVAN OF FAIRFAX COUNTY, A MEMBER OF THE COMMISSION.

I have read in galley proof the opening statement on behalf of the Virginia Commission on Constitutional Government, which precedes the foregoing excerpts from the dissenting opinions of Mr. Justice Frankfurter and Mr. Justice Harlan in the case of *Baker* v. *Carr*. It is in this case, known as "The Tennessee Case," that the Supreme Court of the United States has decided that jurisdiction exists in the Federal courts to determine whether the rights of an individual under the Fourteenth Amendment have been diminished in the area of the ballot.

As a member of the Commission I oppose the foregoing release for the reason that it is based upon the fallacy that the States are sovereign. This is not so because the States derive their powers only from the consent of the governed. In our constitutional system, the people—and only the people—are sovereign. But the sovereign people, being gregarious in the natural law, have established societies, and, desiring to delegate to their societies authority of an executive, legislative and judicial nature, they have called such societies "the States."

In addition, the sovereign people have delegated to the States the authority to establish a three-branch central government. But, in delegating their authority to the States and, through them, to the central government, the sovereign people have made only a delegation and not a relinquishment. Thus, they remain forever constitutionally sovereign.

When the sovereign right of the people to the use of the ballot is defeated or diminished, through the exercise of powers delegated by them, then the constitutional system is abrogated. In such a situation, any and all of the powers which they have delegated, but not relinquished, continue to be reposed in them, and they are entitled to the protection of that society (the State) which they have first established, and also to the protection of the central government which they have authorized the States to establish. When either one of these fails or refuses to recognize the sovereignty of the people, then the other is entitled to return it to them.

In the Tennessee Case, the State failed to protect the sovereignty of its people by wilfully discriminating upon the weight of the ballot by geographical location. Whereupon, the judicial branch of the central government exercised the right and duty delegated to it by making available to the people the machinery to secure their right to the just and equal ballot. This is in the true cause of constitutional government wherein the people are irrevocably sovereign.

THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, an official agency of the Commonwealth of Virginia, was created by the General Assembly in 1958 (Chapter 223, Acts of 1958). Its duties are to assemble, publish and distribute material relating to the State and Federal relationship, with particular emphasis on material upholding the reserved powers of the States.

Members of the Virginia Commission on Constitutional Government:

DAVID J. MAYS, *Chairman*, Richmond, Va.
Attorney; Pulitzer Prize winner for historical biography.

MILLS E. GODWIN, JR., *Vice Chairman*, Suffolk, Va.
Attorney; Lieutenant Governor of Virginia; member Board of Directors, National Bank of Suffolk, Va.

ALBERTIS S. HARRISON, JR., Richmond, Va.
Ex-officio member of Commission; Governor, Commonwealth of Virginia.

E. ALMER AMES, JR., Onancock, Va.
Attorney; member Virginia Senate; Vice-President and Director, First National Bank, Onancock, Va.

CHARLES B. CROSS, JR., Portsmouth, Va.
Attorney; Clerk of the Circuit Court of Norfolk County, Va.

W. C. (DAN) DANIEL, Danville, Va.
Business executive; member Virginia House of Delegates; past National Commander, American Legion.

JOHN A. K. DONOVAN, Falls Church, Va.
Attorney; member Virginia Senate; General Counsel and member Board of Directors of Security National Bank, Fairfax County, Va.

J. SEGAR GRAVATT, Blackstone, Va.
Attorney; Trial Justice for Nottoway County, Va.

FREDERICK T. GRAY, Richmond, Va.
Attorney; former Attorney General of Virginia.

JAMES J. KILPATRICK, Richmond, Va.
Editor, *The Richmond News Leader;* author.

EDGAR R. LAFFERTY, JR., King William, Va.
Business executive; farmer.

GARNETT S. MOORE, Pulaski, Va.
Attorney; member Virginia House of Delegates.

W. TAYLOE MURPHY, Warsaw, Va.
Business executive; banker; former member Virginia House of Delegates; former Treasurer of Virginia.

WILLIAM T. MUSE, Richmond, Va.
Dean, T. C. Williams School of Law, University of Richmond; author.

W. ROY SMITH, Petersburg, Va.
Business executive; member Virginia House of Delegates.

WILLIAM L. WINSTON, Arlington, Va.
Attorney; member Virginia House of Delegates.

Extra copies of this statement may be obtained on request to the Virginia Commission on Constitutional Government, Travelers Building, Richmond, Virginia.


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